NO. 20950

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MIKE ROSADO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTION AND STATEMENT OF THE CASE

Appellant was indicted by a Federal Grand Jury on September 15, 1965, in a four-count Indictment, for violation of Title 21, United States Code, Section 174 [C. T. 2]. 1/ Counts One and Three charged appellant with possession of 4.400 and 9.260 grams of heroin respectively. Counts Two and Four charged appellant with sale of said quantities of heroin.

On November 9, 1965, following trial by the Court, the

1/ C. T. - Clerk's Transcript of Record.

Honorable E. Avery Crary found the appellant guilty on all four counts [C. T. 8].

On December 7, 1965, appellant was sentenced to five years' imprisonment on each count, sentence to run concurrently [C. T. 9].

On December 10, 1965, appellant filed a timely notice of appeal [C. T. 12].

Jurisdiction of the District Court rested on Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174. This Court has jurisdiction under Title 28, United States Code, Section 1291 and Section 1294.

II

STATUTE INVOLVED

The Indictment in this case was brought under Title 21, United States Code, Section 174, which in pertinent part states as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States

contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

III

STATEMENT OF THE FACTS

Michael W. Riely, a Government informant, testified that a couple of weeks prior to March 7, 1965 he met the appellant on Brooklyn Avenue in Los Angeles and the appellant offered to sell him some narcotics [R. T. 57]. 2/ On March 7, 1965, he (Riely) met with Federal Narcotic Agent Harry J. Watson at about 11:00 A. M. [R. T. 21]. He telephoned the appellant and asked about narcotics. He was told to call back in a little while and when he did so, was informed that the narcotics were available [R. T. 22]. Agent Watson then searched Riely and gave him $60 [R. T. 22]. Riely then proceeded to the home of the appellant and met appellant in front of his home. Riely stayed outside, appellant went into his house to make a telephone call. When appellant re-emerged, Riely gave him the $60 [R. T. 22]. Appellant then left the area and returned in about 10 minutes and after again going into his house and re-emerging, he gave Riely 4.400 grams of heroin. Agent

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2/ R. T. - Reporter's Transcript of Record.

Watson meanwhile had kept Riely under constant uninterrupted surveillance [R. T. 62-64]. Watson in corroboration testified that he had searched Riely, found no narcotics in his possession prior to the sale spelled out above, and then Reily delivered the 4.400 grams of heroin to Watson [R. T. 64].

Appellant had stipulated that Herman J. Meuron was a qualified (expert) forensic chemist [R. T. 5]. Meuron testified that the substance delivered to Watson was heroin [R. T. 7-10]. Meuron also testified that the powdery substance representing the second buy on March 9, 1965 was heroin [R. T. 12-13].

On March 9, 1965 Riely again met Watson, then called appellant, and arrangements were made to make a second purchase [R. T. 25, 66]. Watson placed a radio transmitter on the person of Riely. Watson again searched Riely with negative results and gave him $120. They then drove to Evergreen and Winter Streets where Riely exited the vehicle and walked toward the home of appellant [R. T. 25-66]. Except for a brief space of 4 or 5 minutes, Watson kept Riely under constant visual surveillance. During those 4 or 5 minutes, Watson overheard a conversation relating to this second sale.

Watson heard a male voice ask Riely if he (Riely) wanted to buy a half ounce, Riely said yes, then Watson heard a telephone dialed two or three times and a few minutes later heard a telephone ring and a male voice say "five minutes", Riely was then told to wait outside [R. T. 26, 66-7]. Riely who had been in appellant's home for 4 or 5 minutes then emerged and remained in front of the

house [R. T. 67]. Appellant then emerged, left the area for several minutes, returned, and then in the yard in front of the house gave Riely 9.26 grams of heroin [R. T. 26-7, 67-8]. This heroin was then immediately given to Watson [R. T. 27, 67].

Appellant took the stand in his own defense and denied that he had sold heroin to Riely [R. T. 99, 100, 104]. He did not deny the receipt of the monies [R. T. 102, 104]. He did not deny meeting with Riely at the times and places Riely had testified to [R. T. 101, 104]. Appellant testified however that the sales consummated on March 7 and March 9 were of benzedrine pills [R. T. 102-105].

IV

SUMMARY OF ARGUMENT

A. Appellant has waived his right to attack the verdict on the basis of insufficiency of evidence.

B. Evidence whether circumstantial or direct must be, on appeal, viewed in the light most favorable to the Government.

C. The cross-examination of Government's witness was not improperly limited.

V

ARGUMENT

A. APPELLANT HAS WAIVED HIS RIGHT TO ATTACK THE SUFFICIENCY OF THE EVIDENCE.

A close examination of the record reveals that the appellant at no time moved for a judgment of acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure. No such motion was made at the close of the Government's case [R. T. 95] nor at the end of the entire case [R. T. 114, 118].

As stated by this Court in Hardwick v. United States, 296 F. 2d 24 (1961) at pages 25-26:

> "Thus, no motion was made by either defendants for an acquittal upon the ground of insufficiency of the evidence, at any time in the case. Under these circumstances the point has been waived. Ege v. United States, 9 Cir. 1957, 242 F. 2d 879, 883; Joseph v. United States, 9 Cir. 1944, 145 F. 2d 73, cert. denied 323 U. S. 776, 65 S. Ct. 188, 89 L. Ed. 620." [Emphasis added]

Accordingly, the attack by appellant upon the sufficiency of the evidence must fall.

See also:

Foster v. United States, 318 F. 2d 684, at 686 (9 Cir. 1963);

Rule 29, Federal Rules of Criminal Procedure.

B. THE EVIDENCE CLEARLY WAS INSUFFICIENT TO SUSTAIN THE VERDICT.

Conceding, only arguendo, that the appellant did not waive, his objection as to insufficiency attacks the sufficiency of the evidence by asserting that circumstantial evidence must preclude every hypothesis but guilt. It would appear that appellant fails to distinguish between (1) what is circumstantial evidence, (2) what is the probative effect of circumstantial evidence, and (3) the responsibility and obligation of the trier of fact in evaluating same.

Preliminary,circumstantial evidence is clearly defined in instruction #8.02, Mathes and Devitt Federal Jury Practice and Instructions, as follows:

> "There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence -- such as the testimony of an eye-witness. The other is circumstantial evidence -- the proof of a chain of circumstances pointing to the commission of the offense." (citations omitted)

The Government contends that the testimony in this case is direct. However, assuming arguendo that it was circumstantial, its impact is the same, and the verdict must be affirmed.

The probative effect of circumstantial evidence is not that delineated by appellant but rather is better illustrated by the rule which states in substance, that the jury need only be satisfied of the defendant's guilt beyond a reasonable doubt on all the evidence.

In fact in Holland v. United States, 348 U.S. 121 (1954) the Supreme Court in answer to the contention (advanced here by appellant) that where evidence is circumstantial it must exclude every reasonable hypothesis except that of guilt in order to sustain a conviction, stated at page 140:

> "The better rule is that when the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."

Appellant in his brief attempts to substitute his evaluation of the evidence for that of the trier of fact. Appellant is undoubtedly aggrieved at the decision of the trier of fact, and complains that although the trial judge did not swallow the "pills" defense [R. T. 114] the conviction should be reversed. Appellant ignores the fact that the duty and obligation of the trier of the facts is to evaluate and weigh all the evidence, and if conflicts in testimony or evidence have been brought to light during trial, the verdict of guilty or not guilty is the ultimate result of the weighing of the evidence. Stated conversely, the verdict of guilty meant that after a consideration of the sum total of the evidence, the trier of fact decided that every hypothesis but guilt had been eliminated.

United States v. Tutino, 269 F.2d 488 (2 Cir. 1959);

United States v. Brown, 236 F.2d 403 (2 Cir. 1956).

Appellant offers in support of his position his "assumption" (appellant's brief, pp. 5, 7) that a thorough search was not made

by Watson. As appears on pages 69 and 70 of the Reporter's Transcript, appellant only asked Agent Watson if he had searched the mouth and rectum of Riely. Upon the negative answers elicited to those two questions appellant bases his assumption. The Government submits that the assumption is not valid in light of the otherwise unchallenged testimony that Riely was searched before and after both purchases. Continuing, nothing was brought out during the trial that could attach any importance to the failure to examine the mouth and rectum of Riely. This is particularly damaging to appellant in light of the continuous (except for the few minutes during the second buy) surveillance maintained by Agent Watson. Watson, during both purchases, had Riely under actual surveillance at the moments Riely received the heroin and immediately thereafter, and stated that the heroin placed in Riely's hand [R. T. 92] by appellant, both times, was immediately turned over to Watson. There was no opportunity, necessity, or possibility of Riely first removing and then giving Watson anything (if anything there was) secreted in Riely's bodily orifices.

C. CROSS-EXAMINATION OF GOVERNMENT'S WITNESSES WAS NOT IMPROPERLY LIMITED.

Firstly, it needs no affirmation by the Government to acknowledge the rule that cross-examination of a witness is a cardinal right of a litigant. Secondly, at the factual level the contention that cross-examination was curtailed is erroneous. The record is

replete with constant affirmations by the Court that cross-examination would not be curtailed [R. T. 28, 29, 31, 34, 44, 50, 56, 69, 70, 80, 86] nor was it curtailed.

In the case of United States v. Massino, 275 F. 2d 129 (2 Cir. 1960), quoted at great length by appellant, the facts therein and the thrust of that holding is opposite to the situation here. In Massino the Assistant United States Attorney personally requested and obtained from the state authorities a quashing of a state indictment. In the instant matter, as set forth by appellant in his many offers of proof, appellant sought to explore the possible involvement of the witness and the appellant with the state authorities [R. T. 32, 58]. Finally, all questions relating to any promised immunity were allowed [R. T. 33-4, 54, 76-7, 82-3]. In fact, at page 61 of the Reporter's Transcript, the Court itself asked the following question:

> "Mr. Riely, has anyone promised you any immunity or any special benefits or that you would receive any particular leniency in any particular case for your services in this matter?
>
> "(The Witness) None, whatever." (emphasis added)

Clearly then, the cross-examination allowed in this case was proper. In fact in Russell v. United States, 288 F. 2d 520 (1961), this Court laid down the rule as to cross-examination, which rule is particularly appropriate to this case, when it stated at page 523:

"The Court stated he would not bar any inquiry as to any promises of leniency made by someone else. This was not a case where no cross-examination at all was allowed of the witness." [Emphasis added]

Inviting the Court's attention to the cases of Spaeth v. United States, 232 F. 2d 776 (6 Cir. 1956) and Thurman v. United States, 316 F. 2d 205 (9 Cir. 1963) cited by appellant in support of his contention that cross-examination was unduly restricted, the Government respectfully contends that neither case is authority for the appellant's position.

Thurman is pointedly concerned with the effect of the cross-examination upon the jury. In fact the Thurman court stated at page 206 that:

"Appellant was entitled to explore it fully and to have the benefit of whatever effect it might have had upon the jury." [Emphasis added]

In the instant matter, tried by the Court without a jury, such concern is obviously negated.

Further, unlike Spaeth and Thurman the witness in this case was not under indictment nor incarcerated nor awaiting sentence under a plea of guilty.

In fact the Reporter's Transcript commencing at page 31, through page 34, refers specifically to the testimony that appellant was seeking relative to the question of immunity, and at no point in the offer of proof contained on pages 22 and 33 of the Reporter's

Transcript was there any reference to a factual situation that would invoke either the Thurman or Spaeth rule. Further in this regard, the extent of the cross-examination allowed by the lower court, including the court's own questioning, clearly removes this matter from the purview of Thurman or Spaeth. Finally, in Spaeth, at page 778, the offer of proof related to a specific crime committed by the witness, related to his current confinement in a Federal institution and finally that the testimony sought related to a "case" that the witness had mentioned on his direct examination.

All of which, as above stated, is distinctly different from the thrust of the offer of proof made herein. In the instant matter appellant offered to prove by cross-examination that the witness might have been involved with the appellant in a prior matter that resulted in the appellant's incarceration for a period of six months [R. T. 32-33]. Objection to this line of questioning was sustained, but appellant was otherwise not limited in his cross-examination.

CONCLUSION

For the reasons above submitted, it is respectfully requested that the appeal be denied and the judgment below affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Jules D. Barnett
JULES D. BARNETT